

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
*See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.*

**FILED BY CLERK**

**SEP 20 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

AUSTEN DAMM,

Plaintiff/Appellant,

v.

NICHOLAS BISCHOFF, a single man;

RICHARD DUFFIELD and MARY

DUFFIELD, husband and wife;

DUFFIELD YOUNG ADAMSON, P.C.,

fka Duffield Young Adamson &

Alfred, P.C.,

Defendants/Appellees.

2 CA-CV 2009-0177

DEPARTMENT A

DECISION ORDER

Rule 29, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20064901

Honorable Virginia Kelly, Judge  
Honorable Christopher Staring, Judge

AFFIRMED

Leonard & Felker, P.L.C.

By David J. Leonard

Tucson  
Attorneys for Plaintiff/Appellant

Udall Law Firm, LLP

By Peter Akmajian and Jeanna Chandler Nash

Tucson  
Attorneys for  
Defendant/Appellee Bischoff

Grasso Law Firm, P.C.

By Robert Grasso, Jr., and Kim S. Alvarado

Chandler  
Attorneys for  
Defendants/Appellees Richard  
and Mary Duffield and Duffield  
Young Adamson, P.C.

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¶1 Austen Damm appeals from the trial court's orders granting summary judgment against him and in favor of appellees Nicholas Bischoff, Richard and Mary Duffield, and Duffield Young Adamson, P.C.<sup>1</sup> on several counts alleged in his complaint, dismissing the remaining counts, and denying his motion for a new trial. He asserts the court erred in ruling in favor of the appellees and in denying his motion to amend his complaint and his motion for new trial. The parties stipulated that this appeal be accelerated pursuant to Rule 29, Ariz. R. Civ. App. P. Thus, pursuant to subsection (e) of that rule, we summarily dispose of Damm's appeal by this decision order.

¶2 Damm's wife and Bischoff's mother, Margarita, died in October 2003 after a lengthy illness. On September 24, 2003, Damm and Bischoff entered into an agreement purporting to divide certain of Margarita's assets. Specifically, the agreement provided that Damm would receive a life estate in a residence and would receive income from a trust funded by the proceeds of a promissory note. The agreement also provided Damm would, upon his death, bequeath certain property to Bischoff. The same day, Margarita signed an amendment to her revocable trust that gave Damm the same property interests as the agreement had given him. In September 2006, Damm sued Bischoff and

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<sup>1</sup>Because Damm's claims concern Richard Duffield's conduct, we refer to him individually throughout this order.

Duffield—Bischoff’s and Margarita’s attorney—asserting claims for, inter alia, fraud, breach of fiduciary duty, negligence, and negligent misrepresentation. He also asserted several amendments to Margarita’s trust were the result of undue influence by Bischoff and Duffield.

¶3 Damm has not established there was a genuine issue of material fact as to whether Bischoff or Duffield owed him a fiduciary duty. *See* Ariz. R. Civ. P. 56(c)(1) (summary judgment proper if “there is no genuine issue as to any material fact” and “moving party is entitled to a judgment as a matter of law”); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (finding entry of summary judgment appropriate “if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim”). Damm concedes Duffield did not represent him in regards to the September agreement with Bischoff. And Damm’s conclusory assertions in his own declaration notwithstanding, Damm has identified no facts reasonably permitting an inference that Duffield previously had been his attorney. *See Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 275, 560 P.2d 789, 793 (1977) (“Mere conclusions of ultimate facts and law and general allegations do not fulfill the requirement that the supporting affidavits set forth specific facts showing a genuine fact issue exists.”). Additionally, Damm does not argue in his opening brief that Bischoff owed him a fiduciary duty nor is there anything in the record supporting such a claim. *See* Ariz. R. Civ. App. P. 13(a)(6); *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, n.1, 111 P.3d 1003, 1005 n.1 (2005) (arguments first raised in reply brief waived on appeal);

*Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 394 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal). His claims for constructive fraud and breach of fiduciary duty therefore fail. *See Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 53, 211 P.3d 16, 34 (App. 2009) (constructive fraud requires fiduciary or confidential relationship).

¶4 We agree with the trial court that Damm's claims against Duffield for negligence and negligent misrepresentation are barred by the statute of limitations. Had Damm exercised reasonable diligence in 2003, he would have ascertained that the value of the promissory note was not what he asserts he had expected. *See A.R.S. § 12-542* (establishing two-year limitation period for claims of injury to person or property); *Walk v. Ring*, 202 Ariz. 310, ¶¶ 20-23, 44 P.3d 990, 995-96 (2002) (limitation period begins running when cause of action discovered or should have been discovered by plaintiff).

¶5 In any event, the agreement between Damm and Bischoff was rendered largely meaningless by the contemporaneous amendment to Margarita's revocable trust. Pursuant to that amendment, the trust provided the same property interests to Damm as did the agreement. Damm therefore cannot establish he sustained any damages as a result of conduct by Bischoff or Duffield related to the agreement, and his claims based on that agreement necessarily fail. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007) (damages are an element of a negligence claim); *Green*, 221 Ariz. 138, ¶ 53, 211 P.3d at 34 (constructive fraud requires showing of detrimental reliance); Restatement (Second) of Torts § 552(1) (1977) (pecuniary loss element of negligent misrepresentation claim).

¶6 Damm does not argue on appeal that the trial court erred in granting judgment in favor of Bischoff on Damm's claim against Bischoff for negligent misrepresentation. He has abandoned his claims of intentional fraud on appeal. We therefore do not address these claims.

¶7 In the trial court, Damm abandoned his claim of undue influence and moved to amend his complaint to add a claim for tortious interference with his expectancy under the trust, asserting Bischoff and Duffield had exerted undue influence over Margarita, alleging she was a vulnerable adult, to induce her to make several amendments to her revocable trust that reduced his trust benefits. To the extent Arizona law recognizes such a claim, we agree with the court that it is barred by the statute of limitations. § 12-542; A.R.S. § 46-455(K). Damm plainly was aware in 2003 that Margarita had signed several documents at Bischoff's and Duffield's request, including a power of attorney. Thus, the trial court properly denied the proposed amendment as futile. *See Bishop v. State Dep't of Corr.*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App. 1992) (trial court does not abuse discretion in denying motion to amend pleadings if amendment would be futile).

¶8 We affirm the trial court's denial of Damm's motion for a new trial and motion to amend his complaint. We also affirm the judgments in favor of Bischoff and Duffield.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Presiding Judge

Chief Judge Howard and Judge Espinosa concurring.